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No. 02-1850

In the Supreme Court of the United States

WINIFRED N. COTTER, ET AL.,
Petitioners,

v.

THE CITY OF BOSTON, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SUPPLEMENTAL MEMORANDUM
Under The Provisions of Supreme Court Rules 15.8, 18.10 and 25.5

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NEW ISSUE RESULTING FROM A RECENT UNITED STATES DISTRICT COURT DECISION RELATED TO THE INSTANT CASE

On September 9, 2003 the United States District Court for the District of Massachusetts dismissed the case of *Valimore Williams v. City of Boston*, civil action number 00-11082-NG as to all defendants. The mere allegations in the *Williams* complaint were inappropriately and unconstitutionally relied on by the First Circuit Court of Appeals in the instant case as justification, at least in part, for the use of race by the City of Boston against the Petitioners, even though the *Williams* case had not been adjudicated. Obviously, any reliance on the mere allegations contained in the *Williams* case must be deemed unconstitutional as it applies to the instant case.

The Petition for Cert. outlines the fact that the *Williams* case could never have been relied on by the governmental actors as a compelling governmental reason for using race against the Petitioners, because the allegations in the *Williams* case arose seventeen (17) months after race was used against the Petitioners by the City of Boston. In addition, it was the First Circuit Court of Appeals itself that proffered the allegations in the *Williams* case as a "compelling governmental interest," even though it was not pled by the City of Boston as the reason that race was used against the Petitioners.

The Petitioners have raised in the Petition for Cert. the constitutionality of the First Circuit substituting the allegations in the *Williams* case as its own "compelling governmental interest" in place of the governmental interests alleged by the City of Boston. The Petitioners have challenged the retroactive justification of the use of race against the Petitioners by relying on an alleged "racial incident" in the

Williams case that occurred seventeen months after race was used against the Petitioners.

The First Circuit relied on the *Williams* case, not by name, but by allegations when it stated:

> "Commissioner Evans, who made the decision to promote the African American officers, was aware of racial tensions within the Department. Officers had complained to him about disparate treatment, including racially based punishment and job assignment. Officers also complained to him that they were racially targeted following an incident where a noose was placed on an officer's motorcycle."

See Opinion, First Circuit Court of Appeals, p. 21a of Petition for Certiorari.

The "noose incident" referred to in the above quote is the *Williams* case. However, at the time that the First Circuit unfortunately relied on the *Williams* allegations, *Williams* had not been adjudicated in District Court. Indeed, the Petitioners themselves were unaware that the *Williams* case was pending before the United States District Court until after the First Circuit's decision.

On September 9, 2003 the United States District Court for the District of Massachusetts dismissed the *Williams* case and determined that the alleged incident ("the noose incident") in the *Williams* case:

> "most certainly did not rise to the level of seriousness or pervasiveness required to establish a 'hostile environment' or deprivation of constitutional rights. Moreover, Williams failed to adduce any evidence,

other than his own speculative assumptions, that any difficulties he may have faced on the job resulted from racial animus.

For the foregoing reasons, the Defendants' Motion for Summary Judgment is allowed and the case is dismissed in its entirety."

As a result of all of the above, it is now clear that the First Circuit undertook a highly unusual and improper procedure of:

1. Commenting on the *Williams* case which had been filed in United States District Court but had not been adjudicated. One can only speculate on why a circuit court would elect to comment on a matter below that had not proceeded through trial or any appeal process. Such comment suggests a troubling break from procedure, protocol, and fundamental violations of the Petitioners' Substantive and Procedural Due Process rights. Indeed, the raising by the Court of Appeals of the mere allegations in an unrelated case below and the retroactive application to the Petitioners' case strikes at the essence of Due Process, where the Petitioners were never given any opportunity to take discovery on the "mere allegations," much less dispute the application of such mere allegations to the instant case;

2. Relying on the mere allegations of the *Williams* case without the City of Boston ever pleading that it used race against the Petitioners because of the *Williams* allegations;

3. Relying on the mere allegations of the *Williams* case as if the allegations were findings of fact. The First Circuit simply assumed allegations by a plaintiff in an unrelated case to be true and substituted that "motion to dismiss standard" in the *Williams* case for the Strict Scrutiny standard required in the instant case;

4. Retroactively applying the mere allegations in the *Williams* case to the instant case to justify the use of race against the Petitioners, even though the use of race against the Petitioners occurred seventeen (17) months earlier;

5. Inexplicably relying on the mere allegations in the *Williams* case as true for the purpose of establishing a compelling governmental interest on behalf of the City of Boston, while at the same time, disregarding the fact that the City of Boston, in the *Williams* case, had denied the allegations and in fact asserted that the allegations had no basis in reality whatsoever. Thus, the First Circuit must have elected to disbelieve the City's position in *Williams* while at the same time unilaterally pretending that the City believed the "noose incident" was racial for the purposes of the instant case; and

6. Upon being informed in the Petition for Rehearing En Banc that the City of Boston had argued before the United States District Court in the *Williams* case that there were no racial components to the "noose incident," the First Circuit nevertheless allowed its decision to stand.

The District Court found that there was no racial animus involved in the *Williams* case. As such, therefore, the First Circuit could never have relied on the incident and should not have attempted to conclude that the *Williams* allegations could have been justification for the use of race in the instant case.

Fundamentally, it appears that the First Circuit panel went out of its way to "construct" any justification it could for the use of race by the governmental actor, in violation of this Court's admonishment that courts must remain "most skeptical" about the motivations of a governmental actor when race is being employed to the detriment of a citizen. *See Bush v. Vera*, 116 S. Court 1941, 1951-56 (1996). Here, the First Circuit not only has abandoned its "most skeptical" posture, it has actively involved itself in advocating for and substituting of alternative compelling governmental interests as if the First Circuit were the governmental actor in question. Racial classifications are simply too pernicious to permit anything but the "most exact connection between the justification and the classification." *Adarand v. Pena*, 115 US 200, 213 (1995) quoting Stevens, J. dissenting in *Fullilove v. Klutznick*, 448 US 448 (1980). Since the First Circuit has substituted its justification, and now said justification has been adjudicated to be without basis, then the First Circuit, having actively involved itself in the advocacy of the position, can do nothing to now demonstrate any "connection between the classification and the justification," much less the "most exact connection."

Given the First Circuit's (a) substitution of its own justifications; (b) the retroactive application of such justifications; (c) the reliance on the mere allegations in the *Williams* case as if they were findings of fact; (d) commenting on a case below that had not yet been adjudicated; and (e) relying on mere allegations in a case below that had not yet

been adjudicated, one can hardly doubt that the requirements of Strict Scrutiny, as outlined by this Court, were entirely abandoned by the First Circuit in a procedure which is both inappropriate and inexplicable. Moreover, the First Circuit's decision with regard to the *Williams* case is symptomatic of its various other holdings in the instant case. Its decision denying the Petitioners Article III standing, its use of the so-called "plausibility" standard as applied to Strict Scrutiny, ex post facto justifications for the use of race, its total disregard of narrow tailoring, and perhaps most importantly, the disregard of the Court of Appeals' and District Court's own involvement in the consent decree that established the percentages of minorities while holding that the percentage of minority sergeants itself was "concrete evidence of discrimination," all demonstrate a complete disregard of Strict Scrutiny.

Virtually every aspect of the First Circuit's decision indicates that there is no "most exact connection between the justification and the classification," *see Adarand*. There is no possible narrow tailoring even remotely associated with the proffered justifications of the City of Boston or of the substituted, retroactive justifications of the First Circuit Court of Appeals by relying on the *Williams* allegations. Indeed, it cannot be denied that the City of Boston could never have narrowly tailored its use of race against the Petitioners to achieve the so-called compelling governmental interest of rectifying the "racial noose incident" in the *Williams* case, even if the *Williams* case had occurred prior to the use of race against the Petitioners (which it most certainly did not). Neither the City of Boston nor the First Circuit can narrowly tailor a remedy to rectify the effects of an alleged racial incident which the District Court has now determined never happened.

CONCLUSION

The First Circuit has so clearly and utterly abandoned Strict Scrutiny, its intentions, and design, so as to require the finding that its holding and decision with regard to the Petitioners must be reversed.

Respectfully submitted,

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Date: September 18, 2003